UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

TRUS JOIST MacMILLAN, A LIMITED PARTNERSHIP

and Case 18-CA-14061

UNITED STEELWORKERS OF AMERICA, AFL-CIO, CLC

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appearing for the General Counsel.

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Edina, MN, appearing for the Respondent.

DECISION

Statement of the Case

WILLIAM J. PANNIER III, Administrative Law Judge: I heard this case in Brainerd, Minnesota, on October 22 and 23, 1996.[1]

On July 17 the Regional Director for Region 18 of the National Labor Relations Board, herein called the Board, issued a Complaint and Notice of Hearing, based upon an unfair labor practice charge filed on May 17 and amended on July 9, alleging violations of Sections 8(a)(1) and (3) of the National Labor Relations Act, as amended, 29 U.S.C. Sec. 151 *et seq*, herein called the Act. All parties have been afforded full opportunity to appear, to introduce evidence, to examine and cross-examine witnesses, and to file briefs. Based upon the entire record, upon the briefs which were filed, and upon my observation of the demeanor of the witnesses, I make the following findings of fact and conclusions of law.

I. The Alleged Unfair Labor Practices

A. Introduction

This case presents issues regarding whether certain statements, undisputed as to substance, and a particular policy interfered with, restrained or coerced employees in the exercise of statutory rights, thereby violating Section 8(a)(1) of the Act, and, in addition,

[1] Unless stated otherwise, all dates occurred during 1996.

whether a warning notice had been issued to an employee and whether that same employee had been later transferred to another job in violation of Sections 8(a)(3) and (1) of the Act, because that employee had formed, joined or assisted United Steelworkers of America, AFL-CIO, CLC, herein called the Union,[2] and had engaged in concerted activities and, moreover, in an effort to discourage employees from engaging in those activities.

During 1990, Trus Joist MacMillan, a Limited Partnership, herein called Respondent, began construction of a plant in Deerwood, Minnesota, at which, beginning on October 1, 1991, it commenced manufacturing engineered, highly structural strand lumber for non-retail sale. In the course and conduct of those business operations during 1995, Respondent purchased goods valued in excess of $50,000 which it received in Deerwood directly from points outside of the State of Minnesota and, furthermore, sold goods valued in excess of $50,000 which it shipped directly from its Deerwood facility directly to points outside of Minnesota. Therefore, at all material times, Respondent has been engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

During June of 1995 Paul Pierce, who had been assistant plant manager at the Deerwood plant since March of 1994, became plant manager there. From December 1995 through June 1996, John Rocca was manufacturing manager and Randy Holmvig was press production manager. During those periods, Pierce, Rocca and Holmvig had been statutory supervisors and agents of Respondent.

During May of 1995 United Paperworkers International Union, herein called Paperworkers, sent letters to Pierce listing seven or eight employees on its in-plant organizing committee. One of those listed was Keith Haff, the alleged discriminatee in the instant proceeding. Although Paperworkers filed a representation petition and an election was scheduled, it withdrew its petition before any election could be conducted. Thereafter, so far as the evidence shows, there was no further organizing activity during 1995. That would change during 1996.

Organizing Coordinator for District 11 George M. Dubovich testified that, during early January, the Union was contacted by one of Respondent's employees, but it was not Haff, about representation. Between the second or third week of January and the third week in March, a series of meetings were held between the Union and some of Respondent's employees "to get some logistics and talk about what was going on in the plant," testified Dubovich. Then, during the mid- to latter part of the week of March 17 to 23, the Union began visiting the homes of Respondent's employees. It had not been until that week, so far as the record discloses, that authorization cards were solicited from, and signed by, employees of Respondent, other than the approximately 14 employees who had been attending preliminary group meetings with the Union since January. A representation petition was filed somewhere around April 15 and an election was conducted on May 24. The Union lost that election by approximately ten votes. Haff testified that he had been one of 12 to 15 employees who openly supported the Union during its campaign and, further, he had been one of three employees who had served as observers for the Union during the May 24 election.

[2] At all material times the Union has been a labor organization within the meaning of Section 2(5) of the Act.

As stated above, Haff is the only alleged discriminatee in this proceeding. He had started working in the maintenance department for Respondent on July 1, 1991, even before the first billet had been pressed at Deerwood on October 1, 1991. According to Haff, "at the end of two years I bid -- from the maintenance I bid into the green end utility job and then I went -- bid from the green end utility job to a mill feed job out in the wood yard." Haff continued, "I was at that in the wood yard for about two months I guess and then I bid from the wood yard into the debarker job back in the plant, and I worked at debarker job for approximately five, six months I'd say, and then I bid from there to the knife grinding room which when I bid to the knife grinding room I think was in October of '93." He worked there until May 13, 1996, when he was transferred to the remanufacturing finishing area, allegedly for unlawful reasons.

Knife grinding is a support function for the two stranders. The knife grinder removes an assembly of knives from a strander and, after disassembling them, cleans the knives, puts them in a grinder and sharpens them, after which they are reassembled and put back into the strander. A knife grinder also cleans stranders and replaces strander parts, as well as working on slasher decks and helping green end utility and debarker feeds.

When Haff bid successfully for transfer into knife grinding, there already was another employee working there: Lloyd Bordwell. Bordwell had started working for Respondent in security on May 16, 1991, then had transferred to the strander and, during July of 1993, had moved to knife grinding. Thus, as between Haff and Bordwell, the latter was the senior knife grinder.

Haff was active during both the 1995 and 1996 union campaigns. In addition to being on Paperworkers' in-plant organizing committee, he had handed out pamphlets in the lunchroom, had talked to co-workers, had solicited their signatures on authorization cards and, on his hard hat, had worn a label which read, "Things work best when you vote union yes." Respondent does not contest that its officials knew of Haff's support for Paperworkers. Furthermore, though he had not been the employee who had contacted the Union, and has not been shown to have been one of the employees who met with the Union from January into March, Haff did support its campaign, by passing out flyers in the lunchroom and twice at the main gate during shift change, by attending its meetings, by speaking to co-workers on behalf of the Union, and by affixing pro-Union stickers to his thermos.

Bordwell also had engaged in some union activity. Apparently after Paperworkers' campaign had ended, he had applied for another position, but had not been selected. That upset him. So, he testified, "I tried to get a union going. I found out if people was [sic] interested in it or not." That effort, which Bordwell placed as having occurred "in between our two unions," came to nothing and was overtaken by the Union's campaign, though Bordwell was not the employee who initially contacted Dobovich. Still, Bordwell's conversations with other employees about unionizing did give rise to a problem for Haff.

B. The No-solicitation Policy and Application of It to Employees

At the time of the hearing Respondent was in the process of formulating and printing an employee handbook. One portion of it will contain a no-solicitation rule which, in pertinent part, will state: "Any Associate who wishes to solicit (or distribute literature) to other Associates by or on behalf of any individual, organization[,] club or society, may do so only during break periods and meal times in established break areas or lunchrooms. It is prohibited elsewhere. Such solicitation (and distribution) is prohibited when either Associate, solicitor or solicitee, is or should be working." It should be pointed out that Respondent refers to its employees as

associates. Obviously, inasmuch as the handbook had not issued by the time of the hearing, Respondent cannot be held to have violated the Act by an intention to later undertake an action which it may never eventually undertake. Yet, there is more to that rule than mere intention to embody it in a written prohibition which will be disseminated as part of a handbook to Deerwood plant employees.

Plant Manager Pierce admitted that the proposed no-solicitation rule is a correct statement of the no-solicitation rule already in existence at that plant and, further, that had already been communicated to employees working there. Thus, as to the substance of the proposed handbook's no-solicitation rule, Pierce testified, ""we have a draft that is being published and being distributed and that will be the policy and this is -- this is fair to say that this is the policy that's in effect." Moreover, while that policy had not been reduced to writing prior to the hearing, Pierce acknowledged that "it was strictly a management function to inform people that those kinds of activities were not acceptable." Consequently, the substance of the no-solicitation rule had been publicized to Respondent's employees, though not in written form.

Beyond that, while the handbook had not been printed and distributed by the time of the hearing, the fact that it would contain such a rule was known by at least some Deerwood employees. For, Pierce testified, the handbook draft had been "shared with all the members of the team rep committee, which is a group of associates that helped me in formulating this information[.]" Given that fact, and those set forth in the preceding paragraph, absence of actual distribution of the proposed handbook does not negate a conclusion that Respondent's Deerwood employees, or at least some of them, knew that such a no-solicitation rule exists and would be applied to them.

An apparent application of that policy arose on approximately December 31, 1995. On that date, Press Production Manager Holmvig told Haff that Respondent would not "tolerate any union discussion while our associates are performing their scheduled duties." Moreover, Holmvig memorialized his statement to Haff in a memorandum which was placed in Haff's personnel file.

It is undisputed that such a memorandum constitutes neither a verbal nor a written warning under Respondent's disciplinary procedure. Nevertheless, Respondent adduced no explanation for Holmvig's decision to prepare such a memorandum and to place it in Haff's personnel file. Further, Plant Manager Pierce conceded "that I guess I would call [the memorandum] disciplinary. It's just disciplinary discussion." Respondent makes no contention that the memorandum could not have an adverse affect on Haff in the future.

Haff testified that he never discovered Holmvig's memorandum in the personnel file until after the Union had filed its representation petition. No other evidence contradicts that testimony. That is, there is no evidence which provides any basis for inferring that the "disciplinary discussion" memorandum had been shown to Haff when Holmvig prepared it. Nor is there any evidence that Holmvig, or any other official of Respondent, had put Haff on notice on or after December 31, 1995, that the "disciplinary discussion" memorandum had been placed in Haff's personnel file.

Another illustration of application of Respondent's no-solicitation policy arose when Holmvig spoke with Haff during 1996 about union talk. As set forth in subsection A above, between the organizing campaign of Paperworkers and the Union, Bordwell had been talking to other employees about becoming represented. In fact, Bordwell testified that, "probably in -- I am guessing but it was probably in March," he had told Holmvig that he had been asking co-workers about their interest in starting a union campaign. Haff testified that, on a Wednesday

and a Thursday during "the first part of April," he had not worked and Bordwell had been performing knife grinding. Whenever other employees had gone into the knife grinding room, according to Haff, Bordwell had asked "a number of them, if they'd sign a union card."

When he returned to work on Friday, testified Haff, he was called to Holmvig's office where Holmvig said "that there was a lot of union talk in the night -- coming out of the knife grinding room and that it had better stop of -- because they didn't want to hear anybody talk in the knife grinding room."[3] Haff testified that he had responded by explaining that he had been off work "the two days that this took place and this -- this union talk was -- had come from Lloydie Bordwell." Haff's description of this conversation was not contradicted. For, Holmvig was never called as a witness, though there is neither contention nor evidence to support a contention that Holmvig had not been available to testify during the instant proceeding.

Haff did not allow the subject to rest with his remarks to Holmvig. He testified that, during the evening of that same day, he had gone to Manufacturing Manager John Rocca and had complained "that I didn't have anything to do with that union conversation that went on down there at that particular time and that Lloydie did it, and that I wanted him to get Randy Holmvig off my back and I didn't think it was right that he jumped me about something that I didn't have anything to do with at that particular time." According to Haff, Rocca said "just to stay calm until the weekend was over" and that he would conduct a meeting with Haff and Holmvig during the following Wednesday, the next day on which all three to them would be working. Like Holmvig, Rocca was never called as a witness. And, as with Holmvig, there was neither representation nor evidence that Rocca was not available to appear as a witness.

Eventually there was a meeting, as promised by Rocca. It was secretly tape-recorded by Haff. That tape recording has been played into the record. In one amendment made at the beginning of the hearing, the General Counsel alleges that, during it, "Holmvig informed union supporters that discussion of the union in their work environment would not be tolerated." The tape reveals that Holmvig did say as much to Haff during the meeting,

> and I told you this, Keith, in our conversation. I don't have a problem with you at the lunchroom table or off site. In your free time you can do whatever you want as far as discussion of the union or whatever. I don't have a problem with that. But when it's happening in your work environment then we have a problem. Okay. And I think we had a good understanding of that the day we had the discussion.

Though there is no dispute about what Holmvig had said to Haff during that conversation, an issue does exist with respect to when that conversation had occurred. For, Respondent contends that it had to occur during January and that contention appears to be a valid one.

First, during the latter phase of the taped conversation, Rocca refers to "a six inch trial" and "an eight inch trial" that will be run "on the 23rd" and, "That is a Tuesday -- that is a week from this Tuesday." In fact, during 1996, April 23 did occur on a Tuesday. But, so, too, did

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[3] Interestingly, during the tape-recorded conversation discussed below, Haff described what Holmvig had said as follows: ""when I come back on Friday morning Randy calls me in the office and says 'Keith, there is a lot of union talk.' He says 'If I catch you in the finishing end, if I catch you in the maintenance shop,' he says, 'Al and Buzz are going to be watching you and we are going to write you up.'" Still, that recitation is not truly inconsistent with Haff's testimony about what Holmvig had said to him.

January 23. Pierce testified that the "strand trial on 6.6 and 8.8, that trial took place on the 23rd of January." Haff never disputed that testimony as to the month of the trial. Yet, as the tape shows that he had been familiar with Rocca's discussion of it, Haff's failure to dispute Pierce's testimony concerning the month during which the trial was conducted gives rise to a conclusion that the trial had been conducted during January and, based upon that, that the taped conversation had occurred during January.

There is an additional statement in connection with the trials which should not be overlooked. As the discussion progressed, during the taped conversation, to running only one of the stranders, Rocca remarks, "we got that 36 hour [sic] down on the 30th and 31st, then we can do the other one." A few minutes later, Rocca repeats those dates: "That's the 30th and 31st, the next down days, so --" Neither Haff nor Holmvig, both of whom were present when Rocca recited those dates, corrects Rocca's statements about the 30th and 31st being available for the shutting down a strander. But, April is a 30 day month, while January does have a 31st day.

Second, present during the taped conversation had been Sandra Middleton, a consultant to Respondent, though not its employee. She was there because of an incident between Haff and her and, also, because of her asserted concern that Haff believed he had been mistreated and appeared to be becoming stressed. During her taped remarks, Middleton refers to an event pertaining to Christmas and another during November. For example, Middleton states, "I asked you how your Christmas was" and "the last thing you said I mean in November, you know, when I was there on the 28th you said 'Do you have to work on Christmas?'" Later she says to Haff, "I want you to be aware that when people are seriously talking to you and saying things like 'How was your Christmas[?]"

It is not, of course, utterly inconceivable that there could be a discussion during April of events which occurred during the preceding November and December. Still, it seems that had Middleton been upset by what occurred between her and Haff, as she truly appeared to be from her recorded statements, then it seems unlikely that she would have waited four months to raise her concern with Haff. It seems more logical that she would have done so on an occasion more proximate to the incident which upset her.

Finally, Haff testified to only one exchange between Holmvig and himself concerning union activities outside of the break and lunch rooms. Yet, if that had occurred during April, as Haff testified, that would mean that he had omitted any mention of the December 31, 1995, exchange which led to issuance of the "disciplinary discussion" memorandum. For, Haff gave no testimony whatsoever about the conversation between Holmvig and himself which had led the former to prepare and insert that memorandum in Haff's personnel file. If there truly had been two separate conversations, I find it unlikely – based both upon Haff's seeming eagerness to testify about whatever had been said to him by Respondent's officials and upon the thoroughness of the General Counsel's approach to presenting all evidence regarding remarks to Haff – that no evidence whatsoever would have been presented about the conversation which led to the "disciplinary discussion" memorandum.

What seems more probable is that there had been but a single conversation – excluding, of course, the taped conversation – between Holmvig and Haff concerning the latter's union activities in a work area. The totality of the considerations reviewed in the preceding paragraphs show that that single conversation had been on or shortly before December 31, 1995, not during April. When he testified, Haff did not always appear to be doing so with candor. What seems to emerge from that appearance, as well as the foregoing considerations, is that Haff attempted to fortify his case of unlawful motivation for transfer from

knife grinding by transposing Holmvig's December 1995 statements so that they would appear more proximate to that transfer thereby, in Haff's mind, strengthening his discriminatory motivation case against Respondent. I conclude that the remarks by Holmvig about which Haff complained to Rocca occurred on or shortly before December 31, 1995.

As set forth in subsection A above, moreover, Bordwell testified that his effort to try "to get a union going," by asking "if people was [sic] interested in it or not," had occurred "in between our two unions[.]" That is the conduct which Haff claimed, during the taped conversation, had led him to be, in effect, reprimanded by Holmvig. Yet, by April the Union's campaign was underway. April can hardly be characterized as having been a month which had fallen "in between our two unions[.]"

To be sure, Bordwell testified that "probably in March" he had told Holmvig "that I asked people -- I tried to get a union started in between the two unions." That conversation was left not fully developed. Nonetheless, Bordwell's remarks to Holmvig appear to be a description of a past effort, rather than a description of action in which he then was engaging at the time that he spoke with Holmvig. As will be seen in subsection C, *infra*, it is undisputed that Holmvig spoke to Haff about the Union after its home visits started to occur during the latter half of March. Some of his remarks referred to union activities in knife grinding. Bordwell was then the only other knife grinder at Respondent's Deerwood facility. Accordingly, it is not inconceivable that, having learned about the home visits, Holmvig had chosen to speak with both knife grinders regarding their possible union activity. In response, Bordwell acknowledged the activity in which he had earlier engaged.

I conclude that a preponderance of the credible evidence and objective considerations establish that it had been in late December 1995 that Holmvig had made his uncontroverted remarks to Haff that the union talk coming out of the knife room "had better stop of -- because they didn't want to hear anybody talk in the knife grinding room." Respondent argues that such testimony by Haff should not be credited because the latter demonstrated objectively that he was not a reliable witness. Indeed, I have concluded above that Haff was not always a candid witness. Still, the "disciplinary discussion" memorandum leaves no doubt that Holmvig had told Haff "that we will not tolerate any union discussion while our associates are performing their schedules duties." That recitation by Holmvig of his own statements to Haff is remarkably close to the description of them advanced by the latter.

Haff's description of Holmvig's remarks, moreover, is also remarkably consistent with that portion of Respondent's admitted no-solicitation policy which prohibits solicitation "elsewhere" than "in established break areas or lunchrooms." Given that fact, and the recitation in the "disciplinary discussion" memorandum, I conclude that a preponderance of the credible evidence does support the conclusion that, on or before December 31, 1995, Holmvig had warned Haff that union talk in the knife room "had better stop" because Respondent "didn't want to hear anybody talk in the knife grinding room." Ordinarily, analysis would proceed to the issue of whether such remarks naturally interfered with, restrained or coerced an employee in violation of Section 8(a)(1) of the Act. But, a separate issue exists concerning Holmvig's statements and it must be addressed at the threshold.

As set forth in the Statement of the Case, the charge in this matter was filed on May 17. It alleged violations of Sections 8(a)(1) and (3) of the Act. Protested in the "Basis of the Charge" section is only the reassignment of Haff to remanufacturing, or reman, finishing on May 9. No mention whatsoever is made of any other unlawful statement or action. The latter are included in the Amended Charge. But, it was not filed until July 9, more than six months after December 1995. Therefore, I conclude that the six-month limitation of the proviso to

Section 10(b) of the Act bars finding a violation on the basis of a conversation which occurred during that month, such as Holmvig's above-discussed remarks to Haff about "union talk in the knife grinding room. However, such a conclusion is not applicable to the other allegedly unlawful statements and actions in this matter.

"Section 10(b) is tolled until there is either actual or constructive notice of the alleged unfair labor practice." (Citation omitted.) *Mine Workers Local 17*, 315 NLRB 1052, 1052 (1994). Haff testified that he had been unaware until April of Holmvig's memorandum dated December 31, 1995, and had been unaware also that such a memorandum had been placed in his (Haff's) personnel file. Respondent never challenged that aspect of Haff's testimony. That is, Respondent never presented any evidence that Holmvig's memorandum had been shown to Haff at the time of its preparation. Nor did Respondent present evidence which would support a conclusion that, on or shortly after December 31, 1995, Haff had been put on notice that such a memorandum was being placed in his personnel file. Moreover, there is no basis in the record for inferring that, in the ordinary course of Respondent's personnel procedures, Haff would likely have become aware that the "disciplinary discussion" memorandum had been prepared and placed in his personal file. Therefore, Section 10(b) of the Act does not stand as a bar to evaluation of that memorandum and of its continued maintenance in Haff's personnel file.

Neither does Section 10(b)'s proviso impose a bar against consideration of the above-quoted remarks made to Haff during the taped conversation. In its brief, Respondent concedes that the conversation occurred on January 12, within the six-month period preceding the Amended Charge filed on July 9. When he testified, Haff placed the conversation on the Wednesday following the Friday on which he had been spoken to by Holmvig. That would be January 3 which, of course, is outside of that six-month period. Yet, a review of the entire tape shows that the conversation had to have occurred on or after Wednesday, January 10, still within the six-month period preceding filing of the Amended Charge.

In connection with the "six inch" and "eight inch" trials, Rocca states, "That is going to be on the 23rd" which, he continues, will be, "A week from this coming Tuesday." If this conversation had occurred earlier that Wednesday, January 10 it would have been more natural for Rocca to have said that the trials would be occurring two weeks from today (if the conversation had occurred on Tuesday, January 9) or two weeks from this coming Tuesday (if the taped conversation had occurred between Wednesday January 3 and Monday January 8). In consequence, both the remarks in this conversation and the "disciplinary discussion" memorandum are subjects upon which unfair labor practices can be predicated, without being barred from consideration by the proviso to Section 10(b) of the Act.

The statutory right presented by both involves the ability of employees "effectively to communicate with one another regarding self-organization at the jobsite." *Beth Israel Hospital* v. *NLRB*, 437 U.S. 483, 491 (1978). "Early in the history of the administration of the Act the Board recognized the importance of freedom of communication to free exercise of organization rights." *Central Hardware Co.* v. *NLRB*, 407 U.S. 539, 542-543 (1972). "The place of work is a place uniquely appropriate for dissemination of views concerning the bargaining representative and the various options open to the employees." *NLRB* v. *Magnavox Company of Tennessee*, 415 U.S. 322, 325 (1974).

To be sure, restrictions may be placed on that statutory freedom of communication at the jobsite among employees. For example, "a rule against solicitation. . .during 'working time' is presumptively lawful," *Jay Metals*, 308 NLRB 167, 167 (1992), since such a rule is rooted in the long-accepted labor relations maxim that, "Working time is for work." *Our Way, Inc.*, 268 NLRB 394, 394 (1983). Still, just as the statutory right of employees to communicate at the

jobsite is not unlimited, neither is an employer's right to prohibit union solicitation, much less discussion, at the jobsite without limitation.

"No restriction may be placed on the employees' right to discuss self-organization among themselves unless the employer can demonstrate that a restriction is necessary to maintain production or discipline." *NLRB* v. *Babcock & Wilcox Co.*, 351 U.S. 105, 113 (1956). See also, *Republic Aviation Corp.* v. *NLRB*, 324 U.S. 793, 803 (1945). While rules prohibiting solicitation during work time are presumptively valid, "In general, no-solicitation rules are presumed. . .unlawful if they extend to solicitations during nonworking time irrespective of whether the solicitation occurs in a work or nonwork area." *St. John's Hospital*, 222 NLRB 1150, 1150 (1976). "Even a rule prohibiting union solicitation in actual working areas at all times has been upheld only in certain settings," (footnote omitted), *Cooper Tire & Rubber Co.* v. *NLRB*, 957 F.2d 1245, 1250 (5th Cir. 1992), cert. denied, __U.S.___, 113 S.Ct. 492 (November 16, 1992), such as hospitals, restaurants and retail stores.

Respondent – a manufacturing facility – does not fit within any of those categories which "by their very nature. . .exhibit special circumstances." *Id*. at footnote 10. Nor has it adduced evidence which would support a conclusion that, given the nature of its operations, it is justified in prohibiting absolutely solicitation in working areas even during nonworking time. As quoted above, its proposed handbook will ban all solicitations "elsewhere" than "in established break areas or lunchrooms." Thus, a natural reading of that portion of the rule prohibits completely employees from soliciting for a union in working areas, even when the "solicitor" and the "solicitee" are not, and are not expected to be, working. In the absence of a showing of need for so broad a proscription, which has not been made here, that portion of the rule is overly broad under the principles set forth above. Even if it is not Respondent's intention to so broadly prohibit statutorily protected activity, the wording of the proposed rule is "on its face broadly restrictive of Sec. 7 rights," *Vanguard Tours*, 300 NLRB 250, fn. 5 (1990), because if "sweep[s] so broadly as to put in doubt an employee's right to engage in union solicitation protected by the Act without fear of punishment by his or her employer." *Albertson's Inc.*, 307 NLRB 787, 788, fn. 6 (1992).

As pointed out above, since the handbook had not been issued at the time of the hearing – and, indeed, its no-solicitation rule is not alleged as a violation of the Act – there is no basis for concluding that Respondent had violated the act for contemplating an action which may never eventually be taken – for contemplating publication of a rule which may never be imposed. Nevertheless, as also pointed out above, by the time of the hearing Respondent had circulated the proposed handbook, including the restrictive no-solicitation rule, among some of its employees. So, it cannot be said that the proposed rule, prohibiting solicitation in areas of the Deerwood facility other than break areas and lunchrooms, had been unknown to at least some employees working there.

Beyond that, Plant Manager Pierce conceded that the rule recited Respondent's existing no-solicitation policy. He also admitted that it had been "a management function to inform people that those kinds of activities were not acceptable." There is no basis in the evidence for concluding that Respondent's Deerwood supervisors and managers had not followed through on the "management function" – had not informed employees that they could not solicit in areas other than break areas and lunchrooms.

Such a restriction is overly broad in the context of Respondent's Deerwood operations. Respondent has presented no evidence showing that interference with production or discipline will naturally result from solicitations conducted during nonwork time, merely because those solicitations are conducted in work areas. In fact, there is no evidence that, in formulating that

policy, Respondent had even considered the effect on production and discipline of so broad a prohibition. On its face, obviously, so broad a policy prohibits solicitations between employees who have chosen to remain in a work area during a break or lunch period, even though those employees are not expected to be working during those periods. Indeed, by its terms, that policy is so broad that employees can reasonably believe that no solicitations are allowed while they walk from their work stations to a break area or lunchroom.

Given the absence of a showing that such solicitations would interfere with production or discipline at Deerwood, so broad a policy unnecessarily interferes with employees' "freedom of communication [necessary] to the free exercise of organization rights," *Central Hardware Co.* v. *NLRB*, *supra*, by depriving employees of their statutory right "effectively to communicate with one another regarding self-organization at the jobsite." *Beth Israel Hospital* v. *NLRB*, *supra*. Nor, in the circumstances of the instant case, does analysis stop with the issue of solicitations.

In his "disciplinary discussion" memorandum, Holmvig acknowledges that he had prohibited not merely union solicitation, but "union discussion," generally. His use of the term "discussion" cannot be concluded to have been an isolated aberration, not truly reflecting Respondent's actual policy. For, during the taped conversation, as quoted above, Holmvig repeated, in the presence of Manufacturing Manager Rocca, that on his free time Haff could engage in "discussion of the union," but that such discussion "in your work environment" would create "a problem." Consequently, Respondent's policy is not confined merely to solicitations in work areas, but extends to all discussion of a union in work areas.

By definition, not all discussion of a subject rises to the status of a solicitation. To be sure, an exchange of views may pit against each other employees on opposite sides of an issue. To that extent, such exchanges may be construed as solicitations, as one seeks to change the mind of the other. Yet, were solicitation to be so broadly defined under the Act, it would erase altogether any opportunity "for dissemination of views concerning the bargaining representative and the various options open to the employees." *NLRB* v. *Magnavox Company of Tennessee*, *supra*.

Beyond that, "discussion" naturally encompasses exchanges between employees who agree upon a particular result and are conversing about only their agreement upon its desirability and, perhaps, means best tailored for achieving it. Yet, Respondent's broad policy, by its terms, would prohibit such discussions, even though in no sense can it be said that a solicitation is occurring. In sum, the distinction between union solicitation and union discussion is a meaningful one.

Of course, like a no-solicitation rule, where justified by production or disciplinary needs, an employer can prohibit all talking while employees are working. See, e.g., *Stone & Webster Engineering Corporation*, 220 NLRB 905 (1975) and *Pilot Freight Carriers, Inc.*, 265 NLRB 129, 133 (1982). However, Respondent has presented no evidence that production or discipline considerations warrant a no-talking-while-working rule at Deerwood. Indeed, it neither contends nor has shown that it maintains a general no-talking-while-working policy there. As a result, in confining his prohibition to "union discussion" in his December 1995 memorandum, and to "discussion of the union" during the taped conversation, Holmvig singled out one subject and prohibited discussion of it in a context free of a rule against talking while working and against talking generally in work areas. In short, those prohibitions of Holmvig discriminated against discussion of unions, in the process interfering with Haff's statutory right "effectively to communicate with [other employees] regarding self-organization at the jobsite," *Beth Israel Hospital* v. *NLRB*, *supra*, thereby depriving him of ability to disseminate his "views concerning [a] bargaining representative and the various options open to [Respondent's] employees.

NLRB v. *Magnavox Company of Tennessee*, *supra*.

Therefore, I conclude that Respondent's no-solicitation policy -- to the extent that it confines union solicitation to break areas and lunchrooms, its continued maintenance in Haff's personnel file of Holmvig's "disciplinary discussion" memorandum concerning "union discussion," and Holmvig's taped oral prohibition of "discussion of the union" each interfered with employees' exercise of Section 7 rights and, in consequence, violated Section 8(a)(1) of the Act. In reaching those conclusions, I place no weight on the arguments concerning disparate application based upon sports pools and similar activities conducted at the Deerwood facility. Further, it is not material that the unlawful activity targeted at Haff occurred during a period when no union was campaigning there. Violations of Section 8(a)(1) of the Act are not dependent upon existence of a union campaign.

C. Transfer of Haff and Related Statements

To recapitulate, the Union began making home visits to Respondent's Deerwood employees during the third week of March. The representation petition was filed on approximately April 15. The representation election was conducted on May 24. Fifteen days prior to that election, Haff was informed that he was being transferred from knife grinding to the reman finishing area. Before addressing that transfer, however, an earlier alleged conversation must be considered.

Haff testified that during the "last part of March, first part of April" – "after" the taped conversation – Rocca had come to the grinding room where Haff was working. According to Haff, Rocca said, "I hear the Steelworkers were in town over the weekend," and when Haff responded in the affirmative, adding that, "They came to my house and talked to me," Rocca retorted, "I don't know what the company can do for you, any more than they've done. The company is really going to come down hard on you." Respondent argues that, given his asserted disposition to tailor his testimony to buttress his case against it, Haff's testimony should not be credited. True, I have already concluded that Haff did not always testify candidly. But, it is not so easy to extend that conclusion to Haff's description of Rocca's statements.

Although it never represented that Rocca was not available to testify, Respondent never called him as a witness. Accordingly, Haff's description of what had been said to him by Rocca during the "last part of March, first part of April" stands uncontroverted.

Of course, the absence of contradiction is not determinative of whether Haff's description of Rocca's words should be credited. True, it once was held that "it is settled law that where a witness's testimony is not contradicted, a trier has no right to refuse to accept it," *NLRB* v. *Ray Swift Transport Co.*, 193 F.2d 142, 146 (5th Cir. 1951), and even that a respondent's failure to call a witness "permits. . .an adverse inference that his testimony would have been adverse to the Respondent had he testified." (Citations omitted.) *Paramount Poultry*, 294 NLRB 867, 868, fn. 9 (1989). Nonetheless, these are not absolute principles to which slavish adherence is due.

That a trier of fact has no right to refuse to accept uncontradicted testimony is a holding which has later been characterized as "an ancient fallacy which somehow persists despite the courts' numerous rulings to the contrary." *NLRB* v. *Howell Chevrolet Co.*, 204 F.2d 79, 86 (9th Cir. 1953). "Furthermore, when the testimony of a disinterested witness is not directly contradicted, but such testimony is clouded with uncertainty, the trier of fact is not bound to accept it." (Citation omitted.) *Woods* v. *United States*, 724 F.2d 1444, 1452 (9th Cir. 1984). "A trier of fact need not accept uncontradicted testimony as true if it contains improbabilities or if

there are reasonable grounds for concluding that it is false." *Operative Plasterers and Cement Masons International Association Local 394 (Burnham Brothers, Inc.)*, 207 NLRB 147, 147 (1973). As a result, "a finding based solely on the trier's disbelief of uncontradicted evidence is not necessarily invalid," *NLRB* v. *Local 138 International Union of Operating Engineers*, 293 F.2d 187, 192 (2d Cir. 1961), but uncontested testimony may not be dismissed or disregarded "without a detailed explanation." (Citation omitted.) *Missouri Portland Cement Company* v. *NLRB*, 965 F.2d 217, 222 (7th Cir. 1992).

A significant aspect of Haff's testimony is that, while he did not appear reluctant to alter dates when events had occurred, his accounts of the substance of conversations were corroborated by other evidence. For example, his description of Holmvig's warning "that we will not tolerate any discussion while our associates are performing their duties" is essentially what Holmvig stated in his "disciplinary discussion" memorandum. Furthermore, during the taped conversation, Holmvig warned Haff that there was "a problem" whenever "discussion of the union" occurred "in your work environment[.]"

As will be seen, Haff's account of having been told that he would not receive a wage increase, following his transfer to reman finishing, is not merely undisputed, but is conceded by Respondent to have been an accurate description of its position. However, in its Answer, Respondent denied having "informed a union supporter that he would be denied wage adjustment credit for future wage increases." In consequence, when he testified, Haff could not have been on notice that Respondent would eventually acknowledge that, as Pierce put it, Haff's "base wage [would] not increase," because the grade level in reman is below the grade level in which Haff was classified at the time of his transfer. Instead, he received, "a cash payout," as Haff testified that he had been told during June by Holmvig.

Turning to another aspect, Respondent argues that it would have made no sense for it to have singled out Haff during the Union's campaign, inasmuch as he had been but one of several employees who openly had supported the Union. Yet, there is no basis in the evidence for concluding that Respondent, specifically Rocca, would have been aware at commencement of the Union's campaign of the number of employees who were supporting it. Even if its officials had suspected that more than one or two employees might be supporting the Union, by then Respondent had demonstrated that its officials regarded Haff to be a, if not the, leading proponent of unionization among its employees. Three months earlier Holmvig had singled out Haff upon learning of "union talk" that was "coming out of the knife grinding room." Even though Bordwell appears to have been the actual source of that "union talk," and while Haff told as much to both Rocca and Holmvig, the latter nonetheless unlawfully warned Haff, during the taped conversation, that "discussion of the union. . .in your work environment" is "a problem." No evidence was adduced by Respondent of a similar warning having been issued to Bordwell during December of 1995 or during the following January. In fact, so far as the evidence shows, it had not been until March that Holmvig ever had spoken with Bordwell about the latter's union activities. Until then, Haff appears to have been the only employee whom Respondent saw fit to approach concerning suspected union activities.

Even if Respondent had been aware during late March that other employees were active on behalf of the Union, that would not inherently discredit Haff's description of Rocca's statements during the above-described conversation. If it had regarded him as the leading proponent, or as one leading proponent, of unionization, as Respondent appears to have believed, then it would not have been inherently illogical for Rocca to have approached Haff upon learning of the Union's home visits.

That an employer has not targeted all union supporters for unlawful conduct does not, of

itself, preclude a conclusion that it had targeted a limited number, or even one, of them as the object of unlawful conduct. See, *Handicabs, Inc.*, 318 NLRB 890, 897-898 (1995), enfd., __F.d2___ (8th Cir. 1996), and cases cited therein. Similarly, that an employer does not commit the most egregious unfair labor practices possible does not, of itself, somehow relieve it of liability for less serious conduct which is, nevertheless, a violation of the Act.

Union support among an employee complement can be eroded and undermined by a limited number of unlawful acts directed at but a single employee. Unlawful action directed at "a single dissident may have -- and may be intended to have -- an in terrorem effect on others," (citation omitted), *Rust Engineering Company* v. *NLRB*, 445 F.2d 172, 174 (6th Cir. 1971), by "warn[ing other] employees [that the employer does] not look favorably upon the Union," *Northway Nursing Home*, 243 NLRB 544, fn. 1 (1979), thereby discouraging support of a union by all of, at least, most employees.

In sum, no objective consideration inherently contradicts Haff's testimony regarding what Rocca had said to him. Haff did not appear to be describing those remarks with any less candor than he had described other remarks by Respondent's officials which, it turned out, were supported by other evidence. Rocca never denied having told Haff that, "The company is really going to come down hard on you," in the context of Haff's acknowledgment that representatives of the Union had visited his home. Therefore, I conclude that Rocca did make that statement and, as it naturally interferes with, restrains and coerces employee-exercise of Section 7 rights, violated Section 8(a)(1) of the Act.

On May 9, fifteen days before the scheduled representation election, Pierce informed Haff that knife grinding would be reduced to a one-employee operation, with Bordwell being that one employee and with Haff being transferred to the afternoon shift, starting at 2 p.m., in the reman finishing area. Haff acknowledged that he was told, as the reason for the transfer, that "they would be saving the company my wages because of only one knife grinder in the knife grinding room." Haff was still working in reman at the time of the hearing.

The job performed there by Haff is a lower-graded one than that of knife grinder. Still, Haff's labor grade and then-current base wage rate were not changed as a consequence of the transfer. But, as will be seen, the transfer did affect his work schedule, at least initially, and his ability to receive an increase in his base wage rate.

The General Counsel contends that this transfer, so proximate to the representation election, had been unlawfully motivated and, accordingly, had violated Sections 8(a)(3) and (1) of the Act. In so contending, the General Counsel points to certain testimony by Haff. First, he testified, without contradiction, that his work schedule had changed as a result of the transfer. While a knife grinder, he had worked 12-hour shifts, four days one week and three days the next, always during the day. In contrast, at the time of his transfer, reman employees worked eight-hour rotating shifts, with no opportunity for regularly scheduled overtime. Inasmuch as shifts rotated, that meant that Haff began having to work different schedules each week, though approximately six weeks to two months after the transfer, the reman work schedule changed to 12-hour shifts, as Haff had worked when knife grinding, except that he continues to alternate between day and night shifts.

Second, according to Haff, "in the knife grinding room it was basically you would set up your work in the morning, your knives, and you would start your knives, you know. It was basically you kind of did things in order in which you wanted to. You were kind of your own boss." In contrast, he testified, "In reman you have a coordinator and you have an operator that works there. He is kind of boss. He does all the directing. He tells you what to do, when to do,

where to do it." Of course, that means also that Haff appears to be supervised more closely in reman than had been the fact while knife grinding.

Third, Haff testified that when knife grinding, "I could take my breaks at any time I wanted to as long as I kept my work done and I kept things in order. I usually took my breaks at 9 and at noon so I could be up in the lunchroom with the majority of people so I could talk to them." In contrast, testified Haff, reman breaks are taken at times different from "the majority of the people in the plant," and, as a result, "that isolated me from having a chance to talk to anyone that came up for lunch during lunch hour because I just was basically isolated to the same ten, twelve people on my shift all the time. I couldn't talk to anyone else in the plant."

Fourth, according to Haff, "people at the plant that were working, 75 to 80 percent would come through the knife grinding room and I could -- I would have a chance to talk with them, each one of them, for a couple seconds or a few minutes, whatever, when they came through." However, he testified, "when I got down to the reman finishing that isolated me from everyone. I couldn't talk to anybody any more."

Fifth, so long as Haff remained a knife grinder, he was eligible for whatever wage increase Respondent conferred annually. However, his pay grade as a knife grinder was higher than that of the pay grade in reman. Thus, as pointed out above, he was not eligible for an annual increase in his base pay following his transfer. As Pierce explained, "When an associate in a hourly rate that is outside of his pay grade, above his pay grade, it is our policy as a company to give a cash payout equal to the percentage raise times the average yearly hours times the rate."

As a result of that policy, Haff testified that, following his transfer, he had been informed by Holmvig that "my rate was higher than most of the people in the finishing end and I wouldn't get any raise on my hourly raise until the rest of the people in the finishing end caught up with me." He was awarded a cash payout of $603.72 on June 2. But, his base wage rate remained the same and, he testified without contradiction, will remain the same "for the however many years until the reman finishing people catch up with me."

Finally, Haff complained that in the reman area, "You are always breathing dust," and, "It's very -- not near as nice as it was in the knife grinding room because the knife grinding room was a small room where I -- just the knife grinding machine was in." More concretely, he testified that while there had been air conditioning and windows through which sunlight passed into the knife grinding room, in reman finishing "there is no natural sunlight or any air conditioning or anything like that."

Respondent argues that Haff, in effect, had gilded the lily in his descriptions of the comparisons between knife grinding and reman finishing. Indeed, that does appear to have been the fact to some extent. For example, notwithstanding his testimony about the comparatively better work environment in the knife grinding room, Haff admitted during cross-examination that he had complained to supervision about being barely able to stand being in the knife grinding room when knives were grinding because of the fumes. This was another aspect of his testimony which leads me to conclude that Haff was not always testifying with complete candor. Nevertheless, there were other factors which lead to a conclusion that not all of Haff's testimony can be rejected, because some of it was credible.

In the first place, Respondent never actually presented evidence contradicting most of the foregoing testimony by Haff regarding the advantages of knife grinding over reman work. That is, it never contested his testimony about the initial difference in work schedules. It never

disputed his testimony about being "kind of your own boss" in the knife grinding room. It never controverted his account of the different reman breaks and his comparison of ability to speak with other employees during breaks when working in knife grinding versus working in reman. Nor did it truly challenge his description of the working environment in reman.

Beyond that, Respondent conceded that Haff's testimony about wage increases had been accurate: That, in fact, no wage increase in his base pay had been, or would be for some time, available to him in reman, in contrast to the situation in knife grinding. Even though the cash payout equaled the amount which he would have received as a wage increase, there is a basis for at least a perception by an employee that a lack of base pay increase might operate to that employee's disadvantage over the long run.

To be sure, there is no specific evidence that Respondent had been aware of every one of the above-enumerated items which Haff testified had represented an advantage for him as a knife grinder, as opposed to working in reman. Still, as his employer, Respondent had to be aware of some of them. After all, it is Respondent which sets work and break schedules. And, obviously, it is Respondent which sets pay increase policy. Furthermore, Haff had been working as a knife grinder for approximately two-and-a-half years by the time of his transfer to reman. That had been the longest period during which he had worked in any job for Respondent since starting work for it on July 1, 1991. While he may have been unhappy with aspects of the knife grinding work environment, Haff had shown no disposition to bid for another job, though possibilities to do so had existed.

Indeed, during the taped conversation, Consultant Middleton had pointed out to Haff, "I know that you were glad to get this job [knife grinding]. I mean I remember distinctly --" During a later taped conversation, also reproduced in the record, Haff told Human Resources Coordinator Betty Jo Winterowd, while discussing applying for key coordinator positions, "I have a good shift now, all days, and I'd be working nights and rotating three shifts and then sometimes you have to work weekends." In other words, Respondent may not have possessed a complete bill of particulars as to Haff's reasons for being satisfied to continue working as a knife grinder, but it certainly possessed knowledge of some of those factors and, in general, that he preferred continuing to work as a knife grinder. Certainly, it has presented no evidence that would have led it to believe that Haff intended or wanted to bid for another position at Deerwood.

Pierce denied specifically that Haff's transfer had been motivated by his union sympathies. Instead, he testified that the transfer had been motivated by no more than an ongoing effort by Respondent to reduce costs of operation at Deerwood. According to Pierce, there had been a $2 million operating loss there during 1995, offset only by a $1 million insurance claim. Further, he testified, Respondent already had lost $800,000 by May as a result of operations during 1996. Accordingly, during 1995, when budgeting for 1996, Senior Vice President for Manufacturing Operations Pat Smith formulated a "Look for a Buck" program. Under it, Respondent's officials were to locate avenues for reducing cost per cubic foot of manufacturing by approximately ten percent.

In a January 8 interoffice memo to all Deerwood employees, Pierce gave notice that Respondent would be "reduc[ing] our force to a level commensurate with two shifts of remanufacturing," and that, within the next 30 days, Respondent would "abolish[ ] two of the current three Finishing Coordinators (Reman & Shipping) and establishing three new Coordinators who will rotate on the same shifts as the remanufacturing schedule." According to that memo, "The net effect of this reduction will be termination of three Associates." In fact, testified Pierce, that reduction was accomplished through the resignations of Larry Bolton and

Larry Tedmann, and through the termination of Richard Nelson.

Those would not be the only employees whose positions were eliminated as 1996 progressed. During the summer, dust containment employee Candy Larson was transferred to another position, with the position from which she was transferred being left unfilled. During July one of four degreed technicians moved to Denver and his position also was left unfilled. In addition, during July Respondent acquired a new off-loading machine and terminated a wood yard off-loader. That terminated employee was replaced by another off-loader, but the latter's then-vacated position was never filled, thereby reducing the total number of off-loaders in the wood yard from four to three. During August another dust containment employee, Sid Biever, was transferred to the reman finishing area, as had been Haff. The vacated dust containment position was never filled.

Personnel reductions were not the only cost reduction measures pursued by Respondent. During 1995 it froze capital project expenditures; it extended that freeze into 1996. Rather than simply discard short strands generated by the stranders, Respondent began incorporating more of them into its products, so long as structural standards could be maintained. It replaced the pension and profit-sharing dinner for employees and their spouses with an in-plant informal meal for employees only. By the time of the hearing, it was in the process of reducing sanding losses and was considering how resin content might be reduced.

One other cost reduction measure explored by Respondent has been outsourcing. Pierce testified that "we outsource the saw sharpening for the globe line and the remanufacturing area." Indeed, he continued, "We outsource today a very substantial volume of the remanufacturing work. At the time of the petition we were outsourcing remanufacturing but not at the level we are today."

With specific respect to knife grinding, according to Pierce, during the fall of 1995, as Respondent's officials were budgeting for 1996, there had been discussion of "all staffing levels in all areas and knife grinding was one of the areas that we had talked about to see if there was appropriate staffing level there or not." Respondent operates one other timber strand plant, in east Kentucky, and it employs only one knife grinder there. He/she grinds a higher volume of knives than is accomplished at the Deerwood plant.

Yet, Respondent took no action concerning knife grinding operations until sometime during the following spring. Two witnesses testified for Respondent as to when actual discussion of that subject had resumed. One was Purchasing Manager Kenneth Johnson, who performed the work in connection with possible outsourcing of knife grinding. He testified that, as to the date when knife grinding outsourcing had first been discussed, "I can't tell you an exact date. It would have been early in 1996," and, further, "this was taking place in probably February -- March time frame to me. I don't remember exactly but it was early in 1996 that the discussion started on whether we should or shouldn't out-source."

Of course, if those discussions had started as early as February, or even during the first part of March, that would mean that they had pre-dated the Union's home visiting. Based upon Pierce's testimony, however, the subject could not have arisen so early as Johnson testified. For, Johnson testified that the person with whom he first had spoken about outsourcing knife grinding, "Probably would have been Paul Pierce, the plant manager, who is my boss or John Rocca. As pointed out above, Rocca did not appear as a witness. Pierce testified, "When we started first seriously contemplating outsourcing of the [knife grinding] function, to the best of my knowledge, it was late March -- March kind of time frame. March -- April."

April again surfaced when Pierce tried to place in time another recorded conversation. That was one in which he had participated with Haff and Kathy Hopp. As to that conversation, Pierce testified, "I think it was some time at the beginning of April," explaining, "That's the best of my knowledge when it was. It coincided with when we began discussing outsourcing and all those other issues." Based upon Pierce's testimony, accordingly, it cannot be concluded that discussion of outsourcing knife grinding had commenced prior to the Union's home visits which kicked off its organizing campaign.

Once Respondent began considering that subject, it moved at a pace which contrasted with the hiatus which had fallen between its initial discussion of knife grinding operations during the 1995 budgeting discussions and its return to consideration of knife grinding during "late March -- March kind of time frame. March -- April." Purchasing Manager Johnson testified that, as a result of conversations with Pierce and Rocca, he had prepared "a laundry list of criteria" for knife grinding and "a list of vendors that I thought met the criteria," then contacting those vendors to ascertain "if there was any interest on their part to be involved." He met with vendors who showed interest, took them on tour of Respondent's Deerwood plant, answered their questions, and received "a price per knife" from vendors who did bid.

In an interoffice memo to Pierce, dated May 2, Johnson set forth the following "time table based on our discussions regarding the possible out sourcing of the knife grinding operation," with the objective of "research[ing] the economic possibility of out sourcing of the knife grinding operation on or before May 6, 1996":

1) Identify potential vendors	4-22 thru 4-26
2) Conduct tours thru our knife grinding area for prospective vendors and answer questions.	4-22 thru 4-26
3) Identify and review actual costs to TJM for knife grinding in house.	4-22 thru 4-26
4) Compare vendor proposals vs. in house cost for potential cost savings	4-29 thru 5-3
5) Visit selected vendor sites to look at proposed off site knife grinding location.	5-1 thru 5-8
6) Identify contract points for agreement between TJM and selected vendor.	4-29 thru 5-6

In other words, having allowed several months to intervene between initial consideration of knife grinding as a cost savings measure, Respondent abruptly tried to push through to a decision on the subject within an overall 16 day period, using the last date recited on Johnson's above-quoted memo.

Consistent with that time table, Bordwell testified that he had heard a rumor about outsourcing the knife grinding and, "about the third -- the end of the third week in April," he had spoken with Rocca about that rumor. According to Bordwell, Rocca had said that Respondent was "considering" outsourcing and suggested that Bordwell bid for a different job. Bordwell did not want to do so, however. So, he began considering the possibility of bidding for the knife grinding work, as any other vendor would do. He mentioned to Pierce the possibility of doing the work himself and, according to Bordwell, Pierce "suggested that if [Bordwell] felt that way he should talk to John Rocca or Randy Holmvig and suggest that." Bordwell testified that he did ask Holmvig "if I could put a bid on doing the knives, and they got back to me and they did give me an opportunity."

In the end, Bordwell's wife vetoed the idea of his bidding for knife grinding, asserting,

"We don't have to have a bunch of knives" on their premises. When Bordwell reported that to Johnson, the subject arose of Bordwell continuing to do knife grinding work, but doing so by himself. As stated above, that was the procedure followed at Respondent's eastern Kentucky facility. When Respondent's officials sat down to evaluate the bids, they also considered the option of having Bordwell only perform all knife grinding at Deerwood, augmented by key operators whenever excess grinding work or emergency arose, as well as whenever Bordwell was not scheduled for work.

The latter was the choice made by Respondent. As Pierce explained, corroborated by Johnson,

> we knew what Lloyd's quality level was. So, that was not an unknown that you would have with a new vendor and of course the service posture would be substantially improved if you had the grinder on-site. In addition, if there were an emergency situation that came up, we had other individuals in the plant, the key operators, whose -- part of their job description is to be able to operate all equipment throughout the plant and could fill in on an as needed basis. If you took the piece of equipment off-site, you would then be calling a vendor and potentially there might be a break in service that would cause us down time.

Haff never had volunteered to do knife grinding by himself. According to Pierce, Haff "was transferred to the remanufacturing area," because, "That area had the oldest open posting and there was an opening in that area."

Since May 9, Bordwell has performed approximately 95 to 98% of the knife grinding at Deerwood. He testified that key operators ground knives on weekends and when he had been on vacation. Moreover, by having him as the lone knife grinder, Respondent saved somewhat less that 50% of the previous cost of having that work performed.

At first blush, the foregoing facts would appear to establish an invulnerable defense to the allegation that Haff's transfer had been unlawfully motivated. Yet, a more careful examination of that defense reveals several timing aspects which leave it less persuasive than is disclosed by an initial superficial look.

First, Respondent obviously had been aware that knife grinding in eastern Kentucky was being performed for it by only one employee. And Pierce admitted that knife grinding at Deerwood had been one operation reviewed during the 1995 budget discussions. Yet, even though Respondent pursued other cost-savings measures during early 1996 – leading to the above-mentioned two resignations and one termination – there is no evidence whatsoever that its officials had given any further consideration during the remainder of 1995 and during early 1996 either to reducing the number of knife grinders or to outsourcing knife grinding at Deerwood, even though Pierce would claim that "it was fairly clear that we could get the job done with one individual."

A second timing consideration pertains to the point at which Respondent did begin considering outsourcing Deerwood knife grinding. Despite Purchasing Manager Johnson's testimony that Respondent had commenced doing so "probably February -- March time frame," he admitted that he did not "remember exactly" how early during 1996 such discussions had been undertaken. Johnson acknowledged that Pierce had been first person with whom he had spoken about that subject. In turn, Pierce placed first serious contemplation of outsourcing knife grinding in "late March -- March kind of time frame. March -- April." Of course that places

commencement of those discussions at approximately the time as the Union had commenced making home visits to Respondent's employees. In fact, Respondent has presented no evidence showing that the knife grinding outsourcing discussions had preceded the point at which it had learned of those home visits.

There can be no doubt that Respondent had learned fairly quickly about those visits, in light of Rocca's undenied remark to Haff, "I hear the Steelworkers were in town over the weekend." That remark, it also is uncontroverted, had been made during late March or early April. The close proximity between Respondent's learning of initiation of the Union's campaign and its own initiation of consideration of outsourcing knife grinding raises, at least, suspicion that the proximity of those two events "was really no coincidence at all, but rather part of a deliberate effort by management to scotch the lawful measures of [Haff and, possibly of Bordwell also, given the latter's admission to Holmvig that he had been asking co-workers about their interest in becoming represented] before they had progressed too far toward fruition." *NLRB* v. *Jamestown Sterling Corp.*, 211 F.2d 725, 726 (2d Cir. 1954).

A third timing factor involves the seeming haste with which Respondent pushed through to conclusion in attempting to implement an outsourcing decision. This is a comparative factor. Having taken no action whatsoever concerning Deerwood knife grinding and its staffing since initially having discussed those operations during 1995, as quoted above from Johnson's memo, stuffed into four days – "4-22 to 4-26" – were identification of potential vendors, conducting tours for them and answering their questions, and calculating the cost for in-house knife grinding. Only ten more days were allocated for comparing vendors' proposals against in-house cost, visiting selected vendors to examine their off-site knife grinding locations, and identifying contract points for agreement between Respondent and selected vendors.

At no point did Respondent explain why, having waited at least four months after first considering Deerwood knife grinding operations, it had seen fit to push through to conclusion in but 17 days the decision and implementation of that decision. The very abruptness of that entire process, against a background of a prior seemingly leisurely approach to taking any action whatsoever regarding knife grinding operations there, raises further suspicion that Respondent' late April-early May haste had been motivated by something other than a genuine concern about the cost of knife grinding operations at Deerwood. See, e.g., *NLRB* v. *Montgomery Ward & Co.*, 242 F.2d 497, 502 (2nd Cir. 1957), cert. denied, 355 U.S. 829; *NLRB* v. *Elias Bros. Big Boy, Inc.*, 325 F.2d 360, 366 (6th Cir. 1963); *NLRB* v. *Sutherland Lumber Company*, 452 F.2d 67, 69 (7th Cir. 1971); *United Dairy Farmers Coop. Assn.* v. *NLRB*, 633 F.2d 1054, 1062 (3rd Cir. 1980).

A final timing factor involves the relatively brief period between Haff's transfer and the scheduled representation election. In *Concepts & Designs, Inc.* v. *NLRB*, __F.3d___, 153 LRRM 2958 (8th Cir., December 3, 1996), the Court pointed, as one factor supporting a conclusion of unlawful motivation, to the fact that "the company fired [the alleged discriminatees] only thirteen days before the scheduled union election[.]" (__F.3d at ___, 153 LRRM at 2959. Here, there were but 15 days, a not significantly longer period, between notice to Haff of his transfer and the representation election scheduled for May 24.

In sum, the totality of the foregoing considerations leaves Respondent with a considerably less than the invulnerable defense which it seeks to portray. Of course, that does not mean that the General Counsel necessarily must therefore prevail. In evaluating discrimination allegations, "the pivotal factor is motive" (citation omitted), *NLRB* v. *Lipman Brothers, Inc.*, 355 F.2d 15, 20 (1st Cir. 1966), and the ultimate "determination which the Board must make is one of fact -- what was the actual motive of the discharge?" *Santa Fe Drilling Co.*

v. *NLRB*, 416 F.2d 725, 729 (9th Cir. 1969). That ultimate determination must be made in accordance with the methodological approach set forth in *Wright Line*, 251 NLRB 1083 (1980), enfd., 662 F.2d 899 (1st Cir. 1981), cert. denied, 455 U.S. 989 (1982), approved in *NLRB* v. *Transportation Management Corp.*, 462 U.S. 393 (1983). See also, *Concepts & Designs, Inc.* v. *NLRB*, *supra*.

A number of factors support the conclusion that the General Counsel has established a threshold showing of unlawful motivation for Haff's transfer. He had been active on behalf of the Paperworkers during its 1995 organizing campaign and, given the events discussed in subsection B above, even after that campaign Respondent had continued to view Haff as a union activist. Indeed, so far as the record shows, it had regarded him as the leading union activist at Deerwood, since there is no evidence of any action against any other employee similar to that directed against Haff during December 1995 and the following month. In consequence, despite other employees' activities on behalf of the Union, Respondent's view of Haff as a leading union activist, and the fact that he had been the only employee against whom personnel action was directed during the pre-election period, is one factor tending to show unlawful motivation. See, *Concepts & Designs*, 318 NLRB 948, 952-953 (1995), enfd. __F.3d___ (8th Cir., December 3, 1996), and cases cited therein.

That factor is reinforced by the Respondent unlawful efforts, during December 1995 and January 1886, to confine and minimize Haff's union activity, by unlawfully restricting where he could conduct it and by prohibiting him from even discussing unionizing in the knife room. While those unfair labor practices arose from a policy which pertained to all Deerwood employees, there is no evidence that Respondent ever had applied that policy to anyone other Haff – even though Haff told Holmvig and Rocca that it had been Bordwell who had been soliciting co-workers' interest in the knife room on behalf of a union.

Immediately upon learning of the Union's campaign, Manufacturing Manager Rocca raised the subject with Haff. When the latter acknowledged that his home had been visited by representatives of the Union, Rocca became belligerent, threatening that, "The company is really going to come down hard on you." Again, so far as the evidence reveals, no other employee was subjected to mention of the Union's home visits and, more importantly, to a threat such as that directed by Rocca at Haff. Within six to seven weeks thereafter, Haff was transferred from knife grinding, a job which Respondent was aware that he enjoyed performing, to reman finishing. Notice of that transfer was conveyed to Haff only 15 days before the scheduled representation election.

In the circumstances of this case, Rocca's threat is a particularly compelling factor in assessing motivation. For, one indicia of unlawful motivation exists whenever an employer is "opposed to the unionization of its employees[.]" *Concepts & Designs, Inc.* v. *NLRB*, *supra*, __F.2d at ___, 153 LRRM at 2959. Pierce admitted that Respondent "resisted the attempt" by the Union to organize its employees, based upon "a very strong belief in a positive direct relationship with our associates." To preserve that relationship, the events reviewed in subsection B above establish that Respondent was not loathe to resort to unfair labor practices to preserve that "positive direct relationship[.]" So, also, is that established by Rocca's threat to Haff.

With regard to the latter, it cannot be concluded that Rocca merely had been speculating as to Respondent's reaction to Haff's revelation that he had been visited by the Union. Rocca was a high-ranking official at Deerwood; he reported directly to Plant Manager Pierce. The latter testified that Rocca had participated in the 1995 budget discussions. Both Pierce and Johnson testified that Rocca had been a participant in discussions which led to the

decision to transfer Haff to reman finishing, while Bordwell remained as the lone knife grinder. Consequently, Rocca was privy to higher management's attitudes, including those toward unionization of Deerwood employees, and to the basis for personnel decisions which were made there. His view cannot be disregarded as no more than personal speculation and opinion of a supervisor and agent who had no actual knowledge of Respondent's reactions to discovery of the Union's campaign and its intentions with respect to discovery of Haff's contact with the Union.

As discussed above, Respondent denies that its decision to reduce by one the number of Deerwood knife grinders and to transfer Haff to reman had been motivated by the Union's campaign and by Haff's union activities. Yet, those denials rang hollow, even more so in light of the timing factors reviewed above. Respondent never explained why, having disregarded for the remainder of 1995 and almost the first quarter of 1996 further consideration of cost savings in knife grinding operations, it abruptly resumed consideration of that subject at the same time as it learned of the Union's campaign. Also unexplained was its seeming haste in pushing through to a decision concerning knife grinding operations at Deerwood and implementation of that decision. In sum, viewed against objective considerations, Respondent's defense simply does not possess the inherent logic which Respondent portrays it as possessing.

To be sure, Haff's transfer did not remove him from Respondent's payroll, but left him employed and eligible to participate in the representation election. Yet, Respondent's initial approach – consideration of outsourcing knife grinding operations – appears to have contemplated elimination of both Haff and Bordwell. Only as the relatively brief consideration of that course progressed did Respondent change direction and decide to continue conducting its own knife grinding operations. Both Pierce and Johnson attempted to explain that change as being dictated by economics and convenience in having that activity conducted onsite. Still, it is not possible to ignore Bordwell's participation in the events which led to that change.

As described above, Bordwell had been speaking with Pierce, Johnson and Rocca, as well as Holmvig, during the period when knife grinding outsourcing was being considered. He acknowledged that, during a late March conversation with Holmvig, he had discussed his earlier effort to interest coworkers in becoming represented. Those activities, of course, had occurred during the preceding December and had gotten Haff into trouble with Respondent. There is no evidence that Bordwell had renewed his interest in becoming represented once the Union began its campaign. That would not be surprising, given the fact that his prior union interest had been sparked by failure to receive a job for which he had bid and, by late March and April, he was attempting to retain his job as a knife grinder. Supporting the Union would hardly ingratiate him with Respondent and persuade it to accept his proposal to be the lone knife grinder at Deerwood.

Indeed, when he testified, Bordwell appeared to be exercising caution when answering so that he would not do so in a manner which injured Respondent's interest. In short, Respondent's change from an outsourcing course to a reduced knife grinding complement may have been influenced by Bordwell's lack of support for the Union, in conjunction with the desirability of keeping that function in-house. Certainly, nothing in the record detracts from such a conclusion.

Of course, Haff was not terminated – which would have removed him and his union sympathies from Respondent's payroll – but instead was transferred to another area where he remained working for Respondent and eligible to participate in the representation election. In taking that action, it is not altogether impossible that Respondent believed that the transfer might serve as a warning to Haff and would cause him to cease supporting the Union. Yet, that

was not necessary to accomplish Respondent's ultimate goal of maintaining "a positive direct relationship with [its] associates." After all, Haff could cast only one ballot in that election.

A transfer of one of the Union's supporters so proximate to the representation election would demonstrate to other employees the power which Respondent could exercise over their employment. Given the earlier measures which Respondent had taken to eliminate Deerwood jobs and the pre-election consideration of outsourcing knife grinding, employees would naturally be concerned about their own prospects for continued employment there. Transfer of a leading union activist shortly before the representation election would demonstrate that Respondent possessed power over those employees' continued employment in jobs which they preferred to perform and, beyond that, power over their continued employment, altogether. It is not a novel revelation that a particular result can be accomplished as effectively with a stiletto as with a meat ax.

The totality of the credible evidence establishes that that is what occurred here. Whether Respondent ever truly intended to outsource Deerwood knife grinding, or merely threw out the possibility of doing so as a smokescreen to disguise its actual intention to transfer Haff from knife grinding, both to retaliate against him and as a lesson to his coworkers, matters not in the final analysis. Either alternative leads to an identical result. For, Respondent's defense fails to overcome the evidence that it is opposed to unionization of its employees and was disposed to engage in unfair labor practices to prevent that from occurring, that it viewed Haff as a leading proponent and activist for unionization, that its manufacturing manager threatened that "[t]he company is really going to come down hard on you," upon learning that the Union had contacted Haff, and that, concurrently with initiation of the Union's campaign, Respondent put into motion consideration of outsourcing knife grinding operations which eventually culminated in Haff's transfer from a job which Respondent knew that he enjoyed performing. These factors, taken in conjunction with the other factors reviewed above in this subsection and in subsection B, establish by a preponderance of the evidence that Haff's transfer had been motivated by retaliation against him because of his union sympathies and activism and, further, by an intention to discourage other employees from supporting the Union in the representation election by making an example of Haff. Therefore, his transfer from knife grinding violated Sections 8(a)(3) and (1) of the Act.

Conclusions of Law

Trus Joist MacMillan, A Limited Partnership has committed unfair labor practices affecting commerce by issuing and maintaining in the personnel file of Keith Haff a "disciplinary discussion" memorandum, dated December 31, 1995, which recites that Haff had been instructed not to engage in "union discussion" and, further, by transferring Haff from knife grinding to reman finishing, in violation of Sections 8(a)(3) and (1) of the Act; and, by maintaining a policy which confines solicitation to "established break areas or lunchrooms," by telling Haff that he could not discuss a union in his work area, by threatening Haff that "[t]he company is really going to come down hard on you," upon learning that he had been contacted by representatives of United Steelworkers of America, AFL-CIO, CLC, and by telling Haff that he would be denied an increase in his base wage rate as a result of his unlawfully motivated transfer from knife grinding to reman finishing, in violation of Section 8(a)(1) of the Act.

Remedy

Having concluded that Trus Joist MacMillan, A Limited Partnership has engaged in unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and, further, that it be ordered to take certain affirmative action to effectuate the policies of the Act.

With respect to the latter, it shall be ordered to, within 14 days from the date of this Order, transfer Keith Haff back to the knife grinding position from which he had been unlawfully transferred on May 9, 1996,[4] dismissing, if necessary, anyone who subsequently may have been hired or assigned to his knife grinding job. It shall be further ordered to make Haff whole for any loss of earnings and other benefits suffered as a result of the unlawfully motivated transfer, with interest to be paid on the amounts owing, as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). It shall be further ordered to, within 14 days from the date of this Order, remove the "disciplinary discussion" memorandum and all references to the unlawful transfer from knife grinding to reman finishing from Haff's personnel file and all other files which it maintains. Within 3 days after removal of that material from its files, Trus Joist MacMillan, A Limited Partnership shall notify Keith Hall in writing that this has been done and that those documents shall not be used against him in any way.

Upon the foregoing findings of fact and conclusions of law, and upon the entire record and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:[5]

ORDER

Trus Joist MacMillan, A Limited Partnership, its officers, agents, successors and assigns shall:

1. Cease and desist from:

(a). Maintaining a policy which prohibits solicitations on behalf of unions elsewhere in its Deerwood, Minnesota facility other than in established break areas or lunchrooms; maintaining a policy and telling employees that they cannot discuss the subject of unions while they are working, when there is no rule prohibiting all discussion among employees while they are working; threatening that the company will come down hard on employees who are contacted by and speak with United Steelworkers of America, AFL-CIO, CLC, or any other labor organization; and, telling employees that they are not eligible for increases in base wage rates because they are working in jobs with a base wage and they have been transferred to those jobs for discriminatory reasons.

(b). Transferring Keith Haff or any other employee, issuing and maintaining in the personnel file of Keith Haff or any other employee a memorandum stating that "any union discussion" will not be tolerated while associates are performing their duties, when there is no showing of a general no-talking while working rule, and otherwise discriminating against Keith Haff or any other employee because of sympathy, support or activities on behalf of unions, in general, or on behalf of the above-named or any other labor organization.

(c). In any like or related manner interfering with, restraining or coercing employees in the exercise of rights guaranteed them by the National Labor Relations Act.

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[4] Of course, that does not preclude a showing during the compliance phase of this proceeding that Haff eventually would have been transferred from knife grinding, at a later point during the ongoing "Look for a Buck" program which was being pursued throughout 1996.

[5] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a). Within 14 days from the date of this Order, transfer Keith Haff to the job of knife grinder or, if that job no longer exists, to a substantially equivalent position without prejudice to his seniority or any other rights and privileges.

(b). Make whole Keith Haff for any loss of earnings and other benefits suffered as a result of his discriminatory transfer from knife grinding, in the manner set forth in the Remedy section of this Decision.

(c). Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amounts of backpay due under the terms of this Order.

(d). Within 14 days from the date of this Order, remove from the personnel file of Keith Haff the memorandum signed by Randy Holmvig, which states that on December 31, 1995, Haff had been told that "union discussion while our associates are performing their scheduled duties" will not be tolerated, and, in addition, remove from its files any references to that memorandum and to the unlawful transfer of Haff from knife grinding on May 9, 1996, and within 3 days thereafter notify Haff in writing that these actions have been taken and that neither Holmvig's memorandum nor the transfer from knife grinding will be used against him in any way.

(e). Within 14 days after service by the Region, post at its Deerwood, Minnesota place of business copies of the attached notice marked "Appendix." [6] Copies of the notice, on forms provided by the Regional Director for Region 18, after being signed by its authorized representative, shall be posted by Trus Joist MacMillan, A Limited Partnership and maintained by it for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. It shall take reasonable steps to ensure that the notices are not altered, defaced or covered by any other material. In the event that, during the pendency of these proceedings, it has gone out of business or closed the Deerwood facility involved in these proceedings, Trus Joist MacMillan, A Limited Partnership shall duplicate and mail, at its own expense, a copy of the notice to all current employees and all former employees employed by it at any time since November 17, 1995.

(f). Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to steps that it has taken to comply.

IT IS FURTHER ORDERED that the Complaint be, and it hereby is, dismissed insofar as it alleges violations of the Act not found herein.

Dated, Washington, D.C March 4, 1997

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[6] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

William J. Pannier III
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

After a trial at which all parties had an opportunity to present evidence, the National Labor Relations Board has found that we violated the National Labor Relations Act and we have been ordered to post this Notice.

The National Labor Relations Act give all employees the following rights:

To organize
To form, join or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT maintain a policy which prohibits solicitations on behalf of unions in our Deerwood, Minnesota facility elsewhere than in established break areas and lunchrooms.

WE WILL NOT maintain a policy and tell you that you cannot discuss the subject of unions when you are working, when we have no policy which prohibits employees from talking while they are working.

WE WILL NOT threaten that the company will come down hard on you because you have been contacted by, or spoken with, representatives of the United Steelworkers of America, AFL-CIO, CLC, or any other labor organization.

WE WILL NOT tell you that you are not eligible for increases in your wage rates because you are working in a lower graded job, when you were unlawfully transferred to that job.

WE WILL NOT transfer Keith Haff or any other employee, place and maintain in the personnel file of Keith Haff or any other employee memoranda stating that Haff or any other employee was told that “any union discussion” will not be tolerated while associates are performing their duties, or otherwise discriminate against Keith Haff or any other employee because of sympathy, support or activity on behalf of unions, in general, or on behalf of the above-named or any other labor organization.

WE WILL NOT in any like or related manner interfere with, restrain or coerce you in the exercise of your rights protected by the National Labor Relations Act.

WE WILL, within 14 days from the date of this Order, transfer Keith Haff back to knife grinding or, if that job no longer exists, to a substantially equivalent position, without prejudice to seniority or any other rights and privileges which he would have enjoyed had we not unlawfully discriminated against him.

WE WILL make whole Keith Haff for any loss of earnings and other benefits suffered as a result of our discriminatory transfer of him from knife grinding, with interest on amounts owing.

WE WILL, within 14 days from the date of this Order, remove from Keith Haff's personnel file, and from any other files or records which make reference to it, the memorandum of Randy Holmvig which states that on December 31, 1995, Haff was told "that we will not tolerate any union discussion while our associates are performing their scheduled duties," and WE WILL, within 3 days thereafter, notify Haff in writing that this has been done and that that unlawful memorandum will not be used against him in any way.

WE WILL, within 14 days from the date of this Order, remove from our files any references to the unlawful transfer from knife grinding of Keith Haff, and WE WILL, within 3 days thereafter, notify Haff in writing that this has been done and that the unlawful transfer will not be used against him in any way.

TRUS JOIST MacMILLAN, A LIMITED PARTNERSHIP

(Employer)

Dated _____ By _____

(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered with any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 110 South 4th Street, Room 316, Minneapolis, Minnesota 55401–2291, Telephone 612–348–1793.